LODI CITY COUNCIL
SHIRTSLEEVE SESSION
CARNEGIE FORUM, 305 WEST PINE STREET
TUESDAY, DECEMBER 21, 2010

A. Roll Call by City Clerk

An Informal Informational Meeting ("Shirtsleeve" Session) of the Lodi City Council was held Tuesday, December 21, 2010, commencing at 7:00 a.m.

Present: Council Member Hansen, Council Member Katzakian, Council Member Nakanishi, and Mayor Johnson
Absent: Mayor Pro Tempore Mounce
Also Present: City Manager Bartlam, City Attorney Schwabauer, and City Clerk Johl

B. Topic(s)

B-1 Review and Discuss Options for Regulating Medical Marijuana in the City of Lodi (CA)

City Manager Bartlam briefly introduced the subject matter of regulating medical marijuana dispensaries.

Deputy City Attorney Magdich provided a PowerPoint presentation regarding the regulation of medical marijuana dispensaries in the City of Lodi. Specific topics of discussion included the Lodi Municipal Code, federal and state laws governing marijuana, the Federal Controlled Substance Act of 1970, Proposition 215, Senate Bill 420, Compassionate Use Act (CUP), limitations of CUP, purpose of SB 420, who is a qualified patient, who is a primary caregiver, federal and state court case application, California Attorney General's guidance on marijuana grown for medical use, what are marijuana dispensaries, dispensaries under California, considerations for operation of dispensaries, ban on dispensaries and legal basis for the same, Government Code Section 37100, allowing dispensaries based on zoning and permitting, survey results, and proposed time frame for action by the Council.

In response to Mayor Johnson, Ms. Magdich stated dispensaries do not fit into the caregiver category because a caregiver must be doing more than just providing the product.

In response to Council Member Hansen, City Attorney Schwabauer stated the U.S. Supreme Court did not strike down the California law because it does not conflict with federal law for preemption purposes as California does not legalize marijuana but rather decriminalizes marijuana for those that are qualified patients. Ms. Magdich stated there is some uncertainty that remains in the law and at some point the courts will need to weigh in and provide clarity.

In response to Mayor Johnson, Ms. Magdich stated a definition of the term collective is found on page 8 of the Attorney General's guidelines.

In response to Council Member Hansen, Ms. Magdich stated a dispensary cannot be opened under state and federal law because it is illegal under federal law but it can be opened under state law alone if it meets the requirements of caregiver and collaborative.

In response to Council Member Katzakian, Ms. Magdich stated being a qualified collectives, cooperative, or caregiver in an industrial zone is fine if they are dispensing to qualified patients. There are guidelines for collectives and cooperatives, and she stated cooperatives are more formally organized and have legal filing requirements and the Highway 99 facility was an example of a collective operation.

In response to Council Member Hansen, Mr. Schwabauer stated there are no prior restraint constitutional issues associated with medical marijuana as there are with free speech. Ms. Magdich stated there are approximately 11,000 identification cards issued statewide by counties and most people are showing recommendations from physicians to obtain the medical marijuana. She stated generally the recommendation is on a single sheet of paper indicating the patient name, reasons for the need, date, and signature of the physician.

In response to Mayor Johnson, Ms. Magdich stated the recommendation can be verbal but that will not help with possession in the event an individual is pulled over in a traffic stop. Further, she stated retail sale is outside of the cooperative and collective definitions.

In response to Council Member Hansen, Ms. Magdich stated Stockton passed a tax through a simple majority in anticipation of Proposition 26 passing. Mr. Schwabauer stated non-profit dispensaries, similar to other non-profit organizations, can make a profit in order to run the operation, pay salaries, and make improvements to facilities. He further stated cooperatives in Sacramento are taxed with a local sales tax through a public vote whereby the cooperative pays straight sales tax and in addition pays the local tax.

In response to Mayor Johnson, Interim Police Chief Benincasa stated historically when a dispensary has gone into a community the crime rates have gone up based on a totality of circumstance including the area and access.

In response to Council Member Hansen, Ms. Magdich stated some cities are silent and take the position that, because marijuana is illegal under federal law, there is nothing further they need to do. She stated she is not aware of any city that has addressed the issue of medical marijuana dispensaries through a ballot measure unless it is related to a sales tax measure.

In response to Myrna Wetzel, Robin Rushing stated recommendations have to be renewed every year.

Robin Rushing spoke in support of medical marijuana dispensaries in the City based on serving a regional need and economic benefits to the City.

Brian Wendell spoke in support of medical marijuana dispensaries in the City based on his experience with working at a dispensary in Sacramento, service to patients in the area, and economic benefits to the City.

The City Council provided general direction to ban dispensaries in the City.

C. Comments by Public on Non-Agenda Items

None.

D. Adjournment

No action was taken by the City Council. The meeting was adjourned at 8:15 a.m.

ATTEST:

Randi Johl
City Clerk

AGENDA ITEM B-1

CITY OF LODI
COUNCIL COMMUNICATION
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AGENDA TITLE: Review and Discuss Options for Regulating Medical Marijuana Dispensaries in the City of Lodi.

MEETING DATE: December 21, 2010 - Shirtsleeve

PREPARED BY: City Attorney's Office

RECOMMENDED ACTION: Review and discuss options for regulating medical marijuana dispensaries in the City of Lodi.

BACKGROUND INFORMATION: The City Attorney's office will present a PowerPoint overview of the history of medical marijuana legislation and the current state of the law governing the growing, distribution, and use of medical marijuana in California. The City currently has a moratorium on the establishment or operation of medical marijuana dispensaries with the City. The moratorium is to expire on April 13, 2011

Options will be presented for Council discussion regarding the regulation of medical marijuana dispensaries within the City by ordinance. Issues to be covered include a registration process and requirements, operating requirements, taxing/fees, and land use considerations.

Based on the direction received from Council, the City Attorney's office will draft an ordinance regulating medical marijuana dispensaries within the City and bring the same back to the Council for consideration and adoption at its meetings of February 16, 2011 and March 2, 2011, respectively.

First, it is important to understand how medical marijuana can be legally obtained in California. In short, a marijuana dispensary is not a place to buy medically recommended marijuana as one would at a traditional pharmacy. Instead, medical marijuana patients or their primary caregivers can associate in order to collectively or cooperatively cultivate marijuana for medical purposes as provided under existing California law (see Health & Safety Code Section 11362.775). The guidelines issued by the office of Attorney General Edmund G. Brown, Jr., entitled "Guidelines for the Security and Non-Diversion of Marijuana Grown for Medical Use" (August 2008), fully explains the types of "Collectives" and "Cooperatives" that are permitted under California law. In contrast, storefront retail dispensaries of medical marijuana are not legally permitted. A copy of the Attorney General's Guidelines are attached.

California cities have taken various approaches to dealing with medical marijuana dispensaries. Some cities ban them completely by outlawing all businesses that do not comply with federal law. This approach was litigated in *Qualified Patients Assoc. v. City of* Anaheim (187 Cal.App.4th 734 **(2010)).** In *Qualified Patients* the court reversed the trial court's dismissal and reinstated the plaintiffs complaint, but in doing so the court declined to rule on the issue of whether California state law concerning medical marijuana preempted federal law which classifies marijuana as an illegal controlled substance. On December 1, 2010, the California Supreme Court denied review of the case, so at this time the decision of the Fourth District Court of Appeal stands and the litigation will continue on the trial court level. One factor that sets the City of Anaheim's ban from other outright bans on dispensaries is that violation of the ordinance is accompanied by misdemeanor criminal sanctions. An alternative approach may be to ban

APPROVED: _____
Konradt Bartlam, City Manager

dispensaries, but only provide for a civil enforcement remedy (abatement) instead of criminal enforcement.

Other California cities permit dispensaries and cooperatives but impose traditional land use regulations such as only allowing them in industrial areas; limiting proximity to schools, parks and churches; requiring private security; and allowing them under conditional use permits that can be revoked for reasons including excessive police calls and permit violations. Last year the Second District Court of Appeal upheld one city's efforts to regulate zoning for marijuana dispensaries *(City of Claremont v. Kruse*, 177 Cal. App. 4th 1153 (2009)), however the case is currently being appealed, so litigation regarding the legality of and the restrictions that can be imposed on medical marijuana dispensaries is far from over in California.

FISCAL IMPACT: None.

FUNDING: None.

Janice D. Magdich
Deputy City Attorney

Attachment: Guidelines entitled "Guidelines for the Security and Non-Diversion of Marijuana Grown for Medical Use" (August 2008) issued by the office *of* Attorney General Edmund G. Brown, **Jr.**

EDMUND G. BROWN JR.
Attorney General

DEPARTMENT OF JUSTICE
State of California

GUIDELINES FOR THE SECURITY AND NON-DIVERSION OF MARIJUANA GROWN FOR MEDICAL USE

August 2008

In 1996, California voters approved an initiative that exempted certain patients and their primary caregivers from criminal liability under state law for the possession and cultivation of marijuana. In 2003, the Legislature enacted additional legislation relating to medical marijuana. One of those statutes requires the Attorney General to adopt "guidelines to ensure the security and nondiversion of marijuana grown for medical use." (Health & Saf. Code, § 11362.81(d).[1]) To fulfill this mandate, this Office is issuing the following guidelines to (1) ensure that marijuana grown for medical purposes remains secure and does not find its way to non-patients or illicit markets, (2) help law enforcement agencies perform their duties effectively and in accordance with California law, and (3) help patients and primary caregivers understand how they may cultivate, transport, possess, and use medical marijuana under California law.

I. SUMMARY OF APPLICABLE LAW

A. California Penal Provisions Relating to Marijuana.

The possession, sale, cultivation, or transportation of marijuana is ordinarily a crime under California law. (See, e.g., § 11357 [possession of marijuana is a misdemeanor]; § 11358 [cultivation of marijuana is a felony]; Veh. Code, § 23222 [possession of less than 1 oz. of marijuana while driving is a misdemeanor]; § 11359 [possession with intent to sell any amount of marijuana is a felony]; § 11360 [transporting, selling, or giving away marijuana in California is a felony; under 28.5 grams is a misdemeanor]; § 11361 [selling or distributing marijuana to minors, or using a minor to transport, sell, or give away marijuana, is a felony].)

B. Proposition 215 - The Compassionate Use Act of 1996.

On November 5, 1996, California voters passed Proposition 215, which decriminalized the cultivation and use of marijuana by seriously ill individuals upon a physician's recommendation. (§ 11362.5.) Proposition 215 was enacted to "ensure that seriously ill Californians have the right to obtain and use marijuana for medical purposes where that medical use is deemed appropriate and has been recommended by a physician who has determined that the person's health would benefit from the use of marijuana," and to "ensure that patients and their primary caregivers who obtain and use marijuana for

[1] Unless otherwise noted, all statutory references are to the Health & Safety Code.

medical purposes upon the recommendation of a physician are not subject to criminal prosecution or sanction." (§ 11362.5(b)(1)(A)-(B).)

The Act further states that "Section 11357, relating to the possession of marijuana, and Section 11358, relating to the cultivation of marijuana, shall not apply to a patient, or to a patient's primary caregiver, who possesses or cultivates marijuana for the personal medical purposes of the patient upon the written or verbal recommendation or approval of a physician." (§ 11362.5(d).) Courts have found an implied defense to the transportation of medical marijuana when the "quantity transported and the method, timing and distance of the transportation are reasonably related to the patient's current medical needs." (*People v. Trippet* (1997) 56 Cal.App.4th 1532, 1551.)

C. Senate Bill 420 - The Medical Marijuana Program Act.

On January 1, 2004, Senate Bill 420, the Medical Marijuana Program Act (MMP), became law. (§§ 11362.7-11362.83.) The MMP, among other things, requires the California Department of Public Health (DPH) to establish and maintain a program for the voluntary registration of qualified medical marijuana patients and their primary caregivers through a statewide identification card system. Medical marijuana identification cards are intended to help law enforcement officers identify and verify that cardholders are able to cultivate, possess, and transport certain amounts of marijuana without being subject to arrest under specific conditions. (§§ 11362.71(e), 11362.78.)

It is mandatory that all counties participate in the identification card program by (a) providing applications upon request to individuals seeking to join the identification card program; (b) processing completed applications; (c) maintaining certain records; (d) following state implementation protocols; and (e) issuing DPH identification cards to approved applicants and designated primary caregivers. (§ 11362.71(b).)

Participation by patients and primary caregivers in the identification card program is voluntary. However, because identification cards offer the holder protection from arrest, are issued only after verification of the cardholder's status as a qualified patient or primary caregiver, and are immediately verifiable online or via telephone, they represent one of the best ways to ensure the security and non-diversion of marijuana grown for medical use.

In addition to establishing the identification card program, the MMP also defines certain terms, sets possession guidelines for cardholders, and recognizes a qualified right to collective and cooperative cultivation of medical marijuana. (§§ 11362.7, 11362.77, 11362.775.)

D. Taxability of Medical Marijuana Transactions.

In February 2007, the California State Board of Equalization (BOE) issued a Special Notice confirming its policy of taxing medical marijuana transactions, as well as its requirement that businesses engaging in such transactions hold a Seller's Permit. (http://www.boe.ca.gov/news/pdf/medseller2007.pdf.) According to the Notice, having a Seller's Permit does not allow individuals to make unlawful sales, but instead merely provides a way to remit any sales and use taxes due. BOE further clarified its policy in a

June 2007 Special Notice that addressed several frequently asked questions concerning taxation of medical marijuana transactions. (http://www.boe.ca.gov/news/pdf/173.pdf.)

E. Medical Board of California.

The Medical Board of California licenses, investigates, and disciplines California physicians. (Bus. & Prof. Code, § 2000, et seq.) Although state law prohibits punishing a physician simply for recommending marijuana for treatment of a serious medical condition (§ 11362.5(c)), the Medical Board can and does take disciplinary action against physicians who fail to comply with accepted medical standards when recommending marijuana. In a May 13, 2004 press release, the Medical Board clarified that these accepted standards are the same ones that a reasonable and prudent physician would follow when recommending or approving any medication. They include the following:

1. Taking a history and conducting a good faith examination of the patient;
2. Developing a treatment plan with objectives;
3. Providing informed consent, including discussion of side effects;
4. Periodically reviewing the treatment's efficacy;
5. Consultations, as necessary; and
6. Keeping proper records supporting the decision to recommend the use of medical marijuana.

(http://www.mbc.ca.gov/board/media/releases_2004_05-13_marijuana.html.)

Complaints about physicians should be addressed to the Medical Board (1-800-633-2322 or www.mbc.ca.gov), which investigates and prosecutes alleged licensing violations in conjunction with the Attorney General's Office.

F. The Federal Controlled Substances Act.

Adopted in 1970, the Controlled Substances Act (CSA) established a federal regulatory system designed to combat recreational drug abuse by making it unlawful to manufacture, distribute, dispense, or possess any controlled substance. (21 U.S.C. § 801, et seq.; *Gonzales v. Oregon* (2006) 546 U.S. 243, 271-273.) The CSA reflects the federal government's view that marijuana is a drug with "no currently accepted medical use." (21 U.S.C. § 812(b)(1).) Accordingly, the manufacture, distribution, or possession of marijuana is a federal criminal offense. (*Id.* at §§ 841(a)(1), 844(a).)

The incongruity between federal and state law has given rise to understandable confusion, but no legal conflict exists merely because state law and federal law treat marijuana differently. Indeed, California's medical marijuana laws have been challenged unsuccessfully in court on the ground that they are preempted by the CSA. (*County of San Diego v. San Diego NORML* (July 31, 2008) --- Cal.Rptr.3d ---, 2008 WL 2930117.) Congress has provided that states are free to regulate in the area of controlled substances, including marijuana, provided that state law does not positively conflict with the CSA. (21 U.S.C. § 903.) Neither Proposition 215, nor the MMP, conflict with the CSA because, in adopting these laws, California did not "legalize" medical marijuana, but instead exercised the state's reserved powers to not punish certain marijuana offenses under state law when a physician has recommended its use to treat a serious medical condition. (See *City of Garden Grove v. Superior Court* (*Kha*) (2007) 157 Cal.App.4th 355, 371-373, 381-382.)

In light of California's decision to remove the use and cultivation of physician-recommended marijuana from the scope of the state's drug laws, this Office recommends that state and local law enforcement officers not arrest individuals or seize marijuana under federal law when the officer determines from the facts available that the cultivation, possession, or transportation is permitted under California's medical marijuana laws.

II. DEFINITIONS

A. **Physician's Recommendation:** Physicians may not prescribe marijuana because the federal Food and Drug Administration regulates prescription drugs and, under the CSA, marijuana is a Schedule I drug, meaning that it has no recognized medical use. Physicians may, however, lawfully issue a verbal or written recommendation under California law indicating that marijuana would be a beneficial treatment for a serious medical condition. (§ 11362.5(d); *Conant v. Walters* (9th Cir. 2002) 309 F.3d 629, 632.)

B. **Primary Caregiver:** A primary caregiver is a person who is designated by a qualified patient and "has consistently assumed responsibility for the housing, health, or safety" of the patient. (§ 11362.5(e).) California courts have emphasized the consistency element of the patient-caregiver relationship. Although a "primary caregiver who consistently grows and supplies . . . medicinal marijuana for a section 11362.5 patient is serving a health need of the patient," someone who merely maintains a source of marijuana does not automatically become the party "who has consistently assumed responsibility for the housing, health, or safety" of that purchaser. (*People ex rel. Lungren v. Peron* (1997) 59 Cal.App.4th 1383, 1390, 1400.) A person may serve as primary caregiver to "more than one" patient, provided that the patients and caregiver all reside in the same city or county. (§ 11362.7(d)(2).) Primary caregivers also may receive certain compensation for their services. (§ 11362.765(c) ["A primary caregiver who receives compensation for actual expenses, including reasonable compensation incurred for services provided . . . to enable [a patient] to use marijuana under this article, or for payment for out-of-pocket expenses incurred in providing those services, or both, . . . shall not, on the sole basis of that fact, be subject to prosecution" for possessing or transporting marijuana].)

C. **Qualified Patient:** A qualified patient is a person whose physician has recommended the use of marijuana to treat a serious illness, including cancer, anorexia, AIDS, chronic pain, spasticity, glaucoma, arthritis, migraine, or any other illness for which marijuana provides relief. (§ 11362.5(b)(1)(A).)

D. **Recommending Physician:** A recommending physician is a person who (1) possesses a license in good standing to practice medicine in California; (2) has taken responsibility for some aspect of the medical care, treatment, diagnosis, counseling, or referral of a patient; and (3) has complied with accepted medical standards (as described by the Medical Board of California in its May 13, 2004 press release) that a reasonable and prudent physician would follow when recommending or approving medical marijuana for the treatment of his or her patient.

III. GUIDELINES REGARDING INDIVIDUAL QUALIFIED PATIENTS AND PRIMARY CAREGIVERS

A. State Law Compliance Guidelines.

1. **Physician Recommendation**: Patients must have a written or verbal recommendation for medical marijuana from a licensed physician. (§ 11362.5(d).)

2. **State of California Medical Marijuana Identification Card**: Under the MMP, qualified patients and their primary caregivers may voluntarily apply for a card issued by DPH identifying them as a person who is authorized to use, possess, or transport marijuana grown for medical purposes. To help law enforcement officers verify the cardholder's identity, each card bears a unique identification number, and a verification database is available online (www.calmmp.ca.gov). In addition, the cards contain the name of the county health department that approved the application, a 24-hour verification telephone number, and an expiration date. (§§ 11362.71(a); 11362.735(a)(3)-(4); 11362.745.)

3. **Proof of Qualified Patient Status**: Although verbal recommendations are technically permitted under Proposition 215, patients should obtain and carry written proof of their physician recommendations to help them avoid arrest. A state identification card is the best form of proof, because it is easily verifiable and provides immunity from arrest if certain conditions are met (see section III.B.4, below). The next best forms of proof are a city- or county-issued patient identification card, or a written recommendation from a physician.

4. **Possession Guidelines**:

a) **MMP**:[2] Qualified patients and primary caregivers who possess a state-issued identification card may possess 8 oz. of dried marijuana, and may maintain no more than 6 mature or 12 immature plants per qualified patient. (§ 11362.77(a).) But, if "a qualified patient or primary caregiver has a doctor's recommendation that this quantity does not meet the qualified patient's medical needs, the qualified patient or primary caregiver may possess an amount of marijuana consistent with the patient's needs." (§ 11362.77(b).) Only the dried mature processed flowers or buds of the female cannabis plant should be considered when determining allowable quantities of medical marijuana for purposes of the MMP. (§ 11362.77(d).)

b) **Local Possession Guidelines:** Counties and cities may adopt regulations that allow qualified patients or primary caregivers to possess

[2] On May 22, 2008, California's Second District Court of Appeal severed Health & Safety Code § 11362.77 from the MMP on the ground that the statute's possession guidelines were an unconstitutional amendment of Proposition 215, which does not quantify the marijuana a patient may possess. (See *People v. Kelly* (2008) 163 Cal.App.4th 124, 77 Cal.Rptr.3d 390.) The Third District Court of Appeal recently reached a similar conclusion in *People v. Phomphakdy* (July 31, 2008) --- Cal.Rptr.3d ---, 2008 WL 2931369. The California Supreme Court has granted review in *Kelly* and the Attorney General intends to seek review in *Phomphakdy*.

medical marijuana in amounts that exceed the MMP's possession guidelines. (§ 11362.77(c).)

c) **Proposition 215**: Qualified patients claiming protection under Proposition 215 may possess an amount of marijuana that is "reasonably related to [their] current medical needs." (*People v. Trippet* (1997) 56 Cal.App.4th 1532, 1549.)

B. **Enforcement Guidelines**.

1. **Location of Use**: Medical marijuana may not be smoked (a) where smoking is prohibited by law, (b) at or within 1000 feet of a school, recreation center, or youth center (unless the medical use occurs within a residence), (c) on a school bus, or (d) in a moving motor vehicle or boat. (§ 11362.79.)

2. **Use of Medical Marijuana in the Workplace or at Correctional Facilities:** The medical use of marijuana need not be accommodated in the workplace, during work hours, or at any jail, correctional facility, or other penal institution. (§ 11362.785(a); *Ross v. RagingWire Telecomms., Inc.* (2008) 42 Cal.4th 920, 933 [under the Fair Employment and Housing Act, an employer may terminate an employee who tests positive for marijuana use].)

3. **Criminal Defendants, Probationers, and Parolees:** Criminal defendants and probationers may request court approval to use medical marijuana while they are released on bail or probation. The court's decision and reasoning must be stated on the record and in the minutes of the court. Likewise, parolees who are eligible to use medical marijuana may request that they be allowed to continue such use during the period of parole. The written conditions of parole must reflect whether the request was granted or denied. (§ 11362.795.)

4. **State of California Medical Marijuana Identification Cardholders**: When a person invokes the protections of Proposition 215 or the MMP and he or she possesses a state medical marijuana identification card, officers should:

a) Review the identification card and verify its validity either by calling the telephone number printed on the card, or by accessing DPH's card verification website (http://www.calmmp.ca.gov); and

b) If the card is valid and not being used fraudulently, there are no other indicia of illegal activity (weapons, illicit drugs, or excessive amounts of cash), and the person is within the state or local possession guidelines, the individual should be released and the marijuana should not be seized. Under the MMP, "no person or designated primary caregiver in possession of a valid state medical marijuana identification card shall be subject to arrest for possession, transportation, delivery, or cultivation of medical marijuana." (§ 11362.71(e).) Further, a "state or local law enforcement agency or officer shall not refuse to accept an identification card issued by the department unless the state or local law enforcement agency or officer

has reasonable cause to believe that the information contained in the card is false or fraudulent, or the card is being used fraudulently." (§ 11362.78.)

5. **Non-Cardholders:** When a person claims protection under Proposition 215 or the MMP and only has a locally-issued (i.e., non-state) patient identification card, or a written (or verbal) recommendation from a licensed physician, officers should use their sound professional judgment to assess the validity of the person's medical-use claim:

a) Officers need not abandon their search or investigation. The standard search and seizure rules apply to the enforcement of marijuana-related violations. Reasonable suspicion is required for detention, while probable cause is required for search, seizure, and arrest.

b) Officers should review any written documentation for validity. It may contain the physician's name, telephone number, address, and license number.

c) If the officer reasonably believes that the medical-use claim is valid based upon the totality of the circumstances (including the quantity of marijuana, packaging for sale, the presence of weapons, illicit drugs, or large amounts of cash), and the person is within the state or local possession guidelines or has an amount consistent with their current medical needs, the person should be released and the marijuana should not be seized.

d) Alternatively, if the officer has probable cause to doubt the validity of a person's medical marijuana claim based upon the facts and circumstances, the person may be arrested and the marijuana may be seized. It will then be up to the person to establish his or her medical marijuana defense in court.

e) Officers are not obligated to accept a person's claim of having a verbal physician's recommendation that cannot be readily verified with the physician at the time of detention.

6. **Exceeding Possession Guidelines**: If a person has what appears to be valid medical marijuana documentation, but exceeds the applicable possession guidelines identified above, all marijuana may be seized.

7. **Return of Seized Medical Marijuana:** If a person whose marijuana is seized by law enforcement successfully establishes a medical marijuana defense in court, or the case is not prosecuted, he or she may file a motion for return of the marijuana. If a court grants the motion and orders the return of marijuana seized incident to an arrest, the individual or entity subject to the order must return the property. State law enforcement officers who handle controlled substances in the course of their official duties are immune from liability under the CSA. (21 U.S.C. § 885(d).) Once the marijuana is returned, federal authorities are free to exercise jurisdiction over it. (21 U.S.C. §§ 812(c)(10), 844(a); *City of Garden Grove v. Superior Court* (*Kha*) (2007) 157 Cal.App.4th 355, 369, 386, 391.)

IV. GUIDELINES REGARDING COLLECTIVES AND COOPERATIVES

Under California law, medical marijuana patients and primary caregivers may "associate within the State of California in order collectively or cooperatively to cultivate marijuana for medical purposes." (§ 11362.775.) The following guidelines are meant to apply to qualified patients and primary caregivers who come together to collectively or cooperatively cultivate physician-recommended marijuana.

A. Business Forms: Any group that is collectively or cooperatively cultivating and distributing marijuana for medical purposes should be organized and operated in a manner that ensures the security of the crop and safeguards against diversion for non-medical purposes. The following are guidelines to help cooperatives and collectives operate within the law, and to help law enforcement determine whether they are doing so.

1. **Statutory Cooperatives:** A cooperative must file articles of incorporation with the state and conduct its business for the mutual benefit of its members. (Corp. Code, § 12201, 12300.) No business may call itself a "cooperative" (or "co-op") unless it is properly organized and registered as such a corporation under the Corporations or Food and Agricultural Code. (*Id.* at § 12311(b).) Cooperative corporations are "democratically controlled and are not organized to make a profit for themselves, as such, or for their members, as such, but primarily for their members as patrons." (*Id.* at § 12201.) The earnings and savings of the business must be used for the general welfare of its members or equitably distributed to members in the form of cash, property, credits, or services. (*Ibid.*) Cooperatives must follow strict rules on organization, articles, elections, and distribution of earnings, and must report individual transactions from individual members each year. (See *id.* at § 12200, et seq.) Agricultural cooperatives are likewise nonprofit corporate entities "since they are not organized to make profit for themselves, as such, or for their members, as such, but only for their members as producers." (Food & Agric. Code, § 54033.) Agricultural cooperatives share many characteristics with consumer cooperatives. (See, e.g., *id.* at § 54002, et seq.) Cooperatives should not purchase marijuana from, or sell to, non-members; instead, they should only provide a means for facilitating or coordinating transactions between members.

2. **Collectives:** California law does not define collectives, but the dictionary defines them as "a business, farm, etc., jointly owned and operated by the members of a group." (*Random House Unabridged Dictionary*; Random House, Inc. © 2006.) Applying this definition, a collective should be an organization that merely facilitates the collaborative efforts of patient and caregiver members – including the allocation of costs and revenues. As such, a collective is not a statutory entity, but as a practical matter it might have to organize as some form of business to carry out its activities. The collective should not purchase marijuana from, or sell to, non-members; instead, it should only provide a means for facilitating or coordinating transactions between members.

B. **Guidelines for the Lawful Operation of a Cooperative or Collective:** Collectives and cooperatives should be organized with sufficient structure to ensure security, non-diversion of marijuana to illicit markets, and compliance with all state and local laws. The following are some suggested guidelines and practices for operating collective growing operations to help ensure lawful operation.

1. **Non-Profit Operation**: Nothing in Proposition 215 or the MMP authorizes collectives, cooperatives, or individuals to profit from the sale or distribution of marijuana. (See, e.g., § 11362.765(a) ["nothing in this section shall authorize . . . any individual or group to cultivate or distribute marijuana for profit"].

2. **Business Licenses, Sales Tax, and Seller's Permits**: The State Board of Equalization has determined that medical marijuana transactions are subject to sales tax, regardless of whether the individual or group makes a profit, and those engaging in transactions involving medical marijuana must obtain a Seller's Permit. Some cities and counties also require dispensing collectives and cooperatives to obtain business licenses.

3. **Membership Application and Verification**: When a patient or primary caregiver wishes to join a collective or cooperative, the group can help prevent the diversion of marijuana for non-medical use by having potential members complete a written membership application. The following application guidelines should be followed to help ensure that marijuana grown for medical use is not diverted to illicit markets:

a) Verify the individual's status as a qualified patient or primary caregiver. Unless he or she has a valid state medical marijuana identification card, this should involve personal contact with the recommending physician (or his or her agent), verification of the physician's identity, as well as his or her state licensing status. Verification of primary caregiver status should include contact with the qualified patient, as well as validation of the patient's recommendation. Copies should be made of the physician's recommendation or identification card, if any;

b) Have the individual agree not to distribute marijuana to non-members;

c) Have the individual agree not to use the marijuana for other than medical purposes;

d) Maintain membership records on-site or have them reasonably available;

e) Track when members' medical marijuana recommendation and/or identification cards expire; and

f) Enforce conditions of membership by excluding members whose identification card or physician recommendation are invalid or have expired, or who are caught diverting marijuana for non-medical use.

4. **Collectives Should Acquire, Possess, and Distribute Only Lawfully Cultivated Marijuana**: Collectives and cooperatives should acquire marijuana only from their constituent members, because only marijuana grown by a qualified patient or his or her primary caregiver may lawfully be transported by, or distributed to, other members of a collective or cooperative. (§§ 11362.765, 11362.775.) The collective or cooperative may then allocate it to other members of the group. Nothing allows marijuana to be purchased from outside the collective or cooperative for distribution to its members. Instead, the cycle should be a closed-circuit of marijuana cultivation and consumption with no purchases or sales to or from non-members. To help prevent diversion of medical marijuana to non-medical markets, collectives and cooperatives should document each member's contribution of labor, resources, or money to the enterprise. They also should track and record the source of their marijuana.

5. **Distribution and Sales to Non-Members are Prohibited**: State law allows primary caregivers to be reimbursed for certain services (including marijuana cultivation), but nothing allows individuals or groups to sell or distribute marijuana to non-members. Accordingly, a collective or cooperative may not distribute medical marijuana to any person who is not a member in good standing of the organization. A dispensing collective or cooperative may credit its members for marijuana they provide to the collective, which it may then allocate to other members. (§ 11362.765(c).) Members also may reimburse the collective or cooperative for marijuana that has been allocated to them. Any monetary reimbursement that members provide to the collective or cooperative should only be an amount necessary to cover overhead costs and operating expenses.

6. **Permissible Reimbursements and Allocations:** Marijuana grown at a collective or cooperative for medical purposes may be:

a) Provided free to qualified patients and primary caregivers who are members of the collective or cooperative;
b) Provided in exchange for services rendered to the entity;
c) Allocated based on fees that are reasonably calculated to cover overhead costs and operating expenses; or
d) Any combination of the above.

7. **Possession and Cultivation Guidelines**: If a person is acting as primary caregiver to more than one patient under section 11362.7(d)(2), he or she may aggregate the possession and cultivation limits for each patient. For example, applying the MMP's basic possession guidelines, if a caregiver is responsible for three patients, he or she may possess up to 24 oz. of marijuana (8 oz. per patient) and may grow 18 mature or 36 immature plants. Similarly, collectives and cooperatives may cultivate and transport marijuana in aggregate amounts tied to its membership numbers. Any patient or primary caregiver exceeding individual possession guidelines should have supporting records readily available when:

a) Operating a location for cultivation;
b) Transporting the group's medical marijuana; and
c) Operating a location for distribution to members of the collective or cooperative.

8. **Security**: Collectives and cooperatives should provide adequate security to ensure that patients are safe and that the surrounding homes or businesses are not negatively impacted by nuisance activity such as loitering or crime. Further, to maintain security, prevent fraud, and deter robberies, collectives and cooperatives should keep accurate records and follow accepted cash handling practices, including regular bank runs and cash drops, and maintain a general ledger of cash transactions.

C. **Enforcement Guidelines**: Depending upon the facts and circumstances, deviations from the guidelines outlined above, or other indicia that marijuana is not for medical use, may give rise to probable cause for arrest and seizure. The following are additional guidelines to help identify medical marijuana collectives and cooperatives that are operating outside of state law.

1. **Storefront Dispensaries:** Although medical marijuana "dispensaries" have been operating in California for years, dispensaries, as such, are not recognized under the law. As noted above, the only recognized group entities are cooperatives and collectives. (§ 11362.775.) It is the opinion of this Office that a properly organized and operated collective or cooperative that dispenses medical marijuana through a storefront may be lawful under California law, but that dispensaries that do not substantially comply with the guidelines set forth in sections IV(A) and (B), above, are likely operating outside the protections of Proposition 215 and the MMP, and that the individuals operating such entities may be subject to arrest and criminal prosecution under California law. For example, dispensaries that merely require patients to complete a form summarily designating the business owner as their primary caregiver – and then offering marijuana in exchange for cash "donations" – are likely unlawful. (*Peron*, *supra*, 59 Cal.App.4th at p. 1400 [cannabis club owner was not the primary caregiver to thousands of patients where he did not consistently assume responsibility for their housing, health, or safety].)

2. **Indicia of Unlawful Operation:** When investigating collectives or cooperatives, law enforcement officers should be alert for signs of mass production or illegal sales, including (a) excessive amounts of marijuana, (b) excessive amounts of cash, (c) failure to follow local and state laws applicable to similar businesses, such as maintenance of any required licenses and payment of any required taxes, including sales taxes, (d) weapons, (e) illicit drugs, (f) purchases from, or sales or distribution to, non-members, or (g) distribution outside of California.

Regulating Medical Marijuana Dispensaries in the City of Lodi

December 21,2010

Shirtsleeve Session

Lodi Municipal Code

- Medical Marijuana Dispensaries are currently prohibited in the City of Lodi.
- The moratorium will expire on April 13, 2011.
- The moratorium does not prohibit the use of medical marijuana consistent with state law.

The Laws Governing Marijuana

- Federal
- State

Federal Law

- **The Federal Controlled Substance Act of 1970 (CSA):**
  - **Marijuana is categorized as a 'Schedule I' drug under the CSA.**
  - **The CSA prohibits the use of marijuana for any purpose.**
  - October 2009 United States Attorney General Memoranda
    - **Commitment to enforcement of the CSA in all states.**
    - **Did not legalize marijuana or provide a defense to violations of federal law.**
    - **U.S. AG will not prosecute legitimate medical marijuana users.**

California's Medical Marijuana Laws

- Voters approved Proposition 215 –
  - "The Compassionate Use Act of 1996"
    - Health & Safety Code section 11362.5
- In 2004 Senate Bill 420 was enacted
  - "Medical Marijuana Program Act"
    - Health & Safety Code section 11362.7, et. seq.

Compassionate Use Act (CUP)

- Permits seriously ill Californians to use medical marijuana with a doctor's recommendation.
- Protects users of medical marijuana from criminal liability under state law.
- Encourages federal and state government implementation of the Act.

Limitations of the CUP

- Non-medical uses of marijuana are outside of the scope of the CUP.
- Possession, cultivation, sale and transportation of marijuana is still unlawful, but
  - The CUP provides an affirmative defense to criminal prosecution for possession.
- Confusion in the CUP
  - Unclear whether transportation of marijuana for medical use is allowed.
  - "Primary caregiver" not defined.
- Under the CUP, cities are not expressly mandated to allow operators to open dispensaries.

Purpose of the **MMPA**

- Clarify the scope of the application of the CUA and facilitate identification of qualified patients and their designated caregivers.

- Promote uniform and consistent application of the CUA among the counties.
  - Immunity for arrest; and
  - Allows transport of medical marijuana

- Enhance access to patients and caregivers to medical marijuana by expressly allowing collective and cooperative cultivation of medical marijuana.

Who is a Qualified Patient?

- A Qualified Patient is a person whose physician has recommended the use of marijuana to treat a serious illness.
  - Cancer
  - Anorexia
  - AIDS
  - Chronic pain
  - Spasticity
  - Glaucoma
  - Arthritis
  - Migraines
  - Or any other illness for which marijuana provides relief.

Who is a Primary Caregiver?

Health & Safety Code §11362.7 defines a Primary Caregiver as:

- An individual who has 'consistently assumed responsibility for the housing, health, or safety of a patient'.
- Includes: clinics, health care facilities, residential care facilities, hospices.
- A caregiver is not allowed to have more than one patient outside of their own city or county.

Federal and State Marijuana Laws

- Federal law is enforceable despite the CUA and the MMPA – *Gonzales v.* ***Raich*** (2005) 545 U.S. **1**
  - No federal medical necessity defense.
  - Commerce Clause of the Constitution gives Congress the power to regulate controlled substances for all purposes.
  - The Court made no express federal or state preemption findings.

- Federal supremacy principals and the return of confiscated medical marijuana -
  - *City of Garden Grove v. Superior* ***Court*** *(2007)* 157 Cal. App. 4th 355 (review denied, certiorari denied)

Federal and State Marijuana Laws, continued

- The limitations on the amount of medical marijuana a qualified patient or caregiver can possess under the MMPA was struck down by the California Supreme Court in 2010 *(People v. Kelly).*
  - The court held that the CUP did not limit the amount of medical marijuana reasonably necessary to meet the current medical needs of a qualified patient.

California's Medical Marijuana Laws

- Defense to Criminal Prosecution for Possession of Marijuana, including amount
- Defines "Qualified Patients"
- Defines "Primary Caregivers"
- Allow for Collective or Cooperative Cultivation of Medical Marijuana (Health & Safety Code §11362.765)
- AB 2650 Signed by the Governor on September 30, 2010 (Health & Safety Code $11362.768)
  - Prohibits dispensaries within a 600-foot radius of any public or private **school** as of January 1, 2011

California Attorney General's Guidelines on Marijuana Grown for Medical Use

- MMPA required the Attorney General adopt 'guidelines to ensure the security and non-diversion of marijuana grown for medical use'
- Guidelines were issued in August 2008
  - Purpose
    - Ensure marijuana grown for medical purposes is secure and is not diverted to non-patients or illicit markets;
    - Help law enforcement to effectively perform their duties in accordance with California law; and
    - Help patients and their primary caregivers understand how to cultivate, transport, possess, and use medical marijuana under California law.

What are Marijuana Dispensaries?

- Retail Business
- Sell marijuana over the counter
  - By grade, strength and type
- Sell Food products made of marijuana
    - **Cookies,** candies, ect.
- Paraphernalia used for smoking marijuana
- Clothing and accessories

Marijuana Dispensaries under California Law

- The CUP and MMPA are silent as to dispensaries

- Dispensaries are not expressly permitted by either the CUP or the MMPA, regardless of –
  - whether or not they make a 'profit';
  - whether or not a buyer is a qualified patient or a qualified caregiver; or
  - the quantity of medical marijuana sold.

  Inferentially since dispensaries are not permitted under either the CUP and MMPA, they are illegal in California.

Considerations for the Operation of Marijuana Dispensaries

- Possible Nuisances and Secondary Effects of Marijuana Dispensaries
  - Burglaries, robberies and thefts.
  - Fraudulent physician recommendations.
  - Sales of marijuana to customers with obviously fake identification cards.
  - DUI's.
  - Sales to minors.
  - Sale of other illegal drugs to dispensary customers

Options to Consider

1. Outright ban on the establishment of dispensaries within the City.

Or

2. Allow dispensaries, subject to permitting and zoning regulations adopted by ordinance.

Ban on Marijuana Dispensaries

- The outright ban on dispensaries adopted by a number of cities have been subject to court challenge
  - **As** of this date no clear decision on the legality of a ban:
    - *Qualified Patients v. City **of** Anaheim.*
    - Distinction could be criminal penalties for violation of the ordinance versus civil action.
    - Strong argument that city's have the right to enact a ban on retail dispensaries so long as legally permitted cooperatives and collectives are not restricted.

Legal Basis for Banning Dispensaries

- Cities historically exercise exclusive control over land use issues under police powers.
  - Protection of health, safety and welfare

- Dispensaries are not expressly mentioned or defined in the CUP or MMPA.
  - *City of Claremont v. Kruse* – neither the CUP or MMPA preempt a city's enactment or enforcement of land use, zoning or business laws regarding marijuana dispensaries

Government Code Section 37100

The Legislative Body may pass ordinances NOT in conflict with the Constitution and the laws of the United States.

- Some jurisdictions have relied on Government Code section 37100 to prohibit the operation of marijuana dispensaries; however, conflicts between state and federal law on marijuana have not been resolved. **Is** section 37100 adequate to support a ban?

Method for Banning Dispensaries

- Adopt a permitting or licensing provision that only allows dispensaries to operate in compliance with state and federal laws; or
- Adopt a permitting or licensing provision that only allows dispensaries operating in compliance with state law (collectives and cooperatives would be permitted); or
- Prohibit dispensaries in all land-use zones.

Allow Dispensaries Subject to Zoning Regulations and a Permitting Process

- Allow dispensaries to operate only in designated zoning areas
  - Commercial and/or Industrial.
  - Establish restrictions near parks and other city recreational areas necessary to protect the health, safety and welfare of the community.
- Only permit dispensaries that comply with state law, i.e., collectives and cooperatives.
- Require Issuance of a Conditional Use Permit
  - Background checks of owners and employees
  - Set hours of operation
  - Security
  - Numerical Limits/Selection Process
  - Permit oversight?

Zoning Regulations and a Permitting Process, continued

- Limit the number of dispensaries
- Limit how close a dispensary can be to another dispensary
- Prohibit dispensaries from profiting from the sale of marijuana
- Tax the distribution of medical marijuana and require a Seller's Permit from the State Board of Equalization
  - Taxing would require compliance with Proposition 218
  - Fees imposed with require compliance with Proposition 26

Medical Marijuana Dispensaries in California - Survey Results

- Statewide
  - As of September 2010
    - 139 cities and 9 counties ban dispensaries
    - 103 cities and 15 counties have moratoriums
    - 34 cities have adopted ordinances regulating dispensaries

Source: Safe Access

- Locally
  - Galt--moratorium
  - Elk Grove--Ban
  - Sacramento--permits in comm./industrial
  - Stockton--regulates, limits number & taxes
  - Tracy--Ban
  - Manteca--Bans dispensaries; allows coops/collectives
  - Modesto--Ban

Proposed Timeframe for Council Action on Marijuana Dispensaries

- Based on Council direction the City Attorney's Office **will** draft an appropriate ordinance
  - February 16, 2011- Introduce the ordinance and conduct a public hearing
  - March 2, 2011 – Second reading and adoption of the ordinance
  - April 1, 2011 – Effective date

Comment, Discussion & Direction

- Public Comment
- Discussion and Questions of Council
- Direction to Staff

San Jose is state's newest pot battleground

SAN JOSE (AP) — As marijuana goes mainstream in communities throughout California, the state's third-largest city has become the next big battleground over the drug's future.

Medical marijuana retailers this fall have faced raids and stings by narcotics agents who accuse them of old-fashioned drug trafficking, even as the San Jose City Council debated regulations for pot dispensaries and voters approved a cannabis tax to fill depleted city coffers.

The crackdown highlights a stubborn legal reality that persists despite a growing sense that storefront pot shops have become a permanent part of the California landscape: the law around medical marijuana is vague, and you can still get busted.

"They're trying to make money off it, and that's ridiculous,'' Bob Cooke, the state Bureau of Narcotics Enforcement agent overseeing the raids, said of the dispensary owners who have been targeted.

Medical marijuana advocates say the raids have undermined efforts by dispensaries to comply with the law and to act as good neighbors who have much to contribute to the city's hard-hit economy.

Dispensaries shut down by law enforcement include members of the city's Medical Cannabis Collectives Coalition, a group that lobbies the City Council on behalf of dispensaries, MC3 spokesman Paul Stewart said. Dispensary owners in the group were acting in good faith and feel tricked by the raids, he said.

'We're stepping back saying, We're the ones trying to work with you to come up with sensible regulations,"' Stewart said. "'Now you're hitting the same collectives trying to help you and will ultimately generate revenue for you?"

Much of the confusion over the state law hinges on a provision that prohibits making a profit from medical marijuana. Dispensaries get around this by describing themselves as collectives or cooperatives and requiring patients to designate the dispensary a "primary caregiver."

Under the state's medical marijuana law passed by voters in 1996, only a patient with a doctor's recommendation or a patient's primary caregiver can grow or obtain pot.

Law enforcement critics complain that dispensaries — some with tens of thousands of members — are no more primary caregivers to their customers than are liquor store owners.

Still, raids on dispensaries have become increasingly rare, especially in other Bay Area cities such as San Francisco, Oakland and Berkeley, which have passed ordinances regulating pot shops like other small businesses.

San Jose officials by contrast have had difficulty reaching agreement on how to regulate dispensaries. This city of 1 million has seen an explosion in the number of pot shops in the two years since the Obama Administration declared a hands-off approach in states where the drug is approved for medical use.

Santa Clara County prosecutor Frank Carrubba, who heads the narcotics enforcement division of the district attorney's office, estimates that San Jose has nearly 90 medical marijuana dispensaries and the county more than 100 in all.

San Francisco, with a slightly smaller population, has about 30 dispensaries. Oakland, a city a little less than half the size of San Jose, has four.

"We're weeding out the people who are selling drugs. The ones who are providing medicine are allowed to exist," Carrubba said.

How police and prosecutors decide who is a drug dealer and who is a caregiver has become the main point of contention between investigators and the dispensaries in the San Jose cases.

County investigators spelled out their standards in a search warrant affidavit for a recent raid on the Angel's Care Collective in Santa Clara, a city of 100,000 neighboring San Jose.

District Attorney. Investigator Dean Ackermann, an undercover officer, stated that he bought marijuana at Angel's Care multiple times without ever receiving any kind of health care advice. The officer said he was charged $12 to $13 per gram of pot. He said that's more than 10 times the cost of cultivating a gram of marijuana.

If the dispensary truly was a collective, the affidavit said the undercover officer was never told how to participate.

The officer's "only involvement in the collective was to purchase marijuana at street level prices," the affidavit said.

According to the affidavit, Angel's Care's operators told investigators they do not run the dispensary as a business and that all the money goes to cover utilities, wages for 15 employees and "donations" to collective members who supply the dispensary with marijuana.

PAUL SAKUMA/AP

David Genovese stands outside of his closed San Jose Patients Group office on Thursday. San Jose has become the next big battleground over the future of medical marijuana. This fall, the retailers have faced raids and stings by narcotics agents who accuse them of drug trafficking, even as the city council has debated regulations for pot dispensaries and voters approved a cannabis tax to fill depleted city coffers.

The operators also told investigators that patients are not purchasing marijuana from the dispensary but are making donations.

At no point in the affidavit is Angel's Care accused of providing pot to anyone who does not have a physician's recommendation.

San Jose attorney Jim Roberts, who represents Angel's Care and two other raided dispensaries, said all were operating as nonprofit groups in full compliance with California law.

State law allows law enforcement agencies to take a cut of the assets seized in any bust involving illegal drugs.

Roberts is fighting the county's effort to confiscate the cash agents found at the dispensaries and in dispensary bank accounts frozen since the raids. The cash and other assets sought by the county are more than $200,000, Roberts said.

"What they're really after is money," he said.

Carrubba said his office's sole interest is prosecuting crimes.

County prosecutors have charged 22 operators of medical marijuana delivery services busted in a Craigslist.org sting for illegally selling marijuana. The owners of just one of the four dispensaries raided have been formally charged so far. Carrubba said that's because of the complexity of the financial records involved, but Roberts questions the strength of the cases against the dispensaries.

Some dispensary operators are not waiting to find out whether those charges will ever come down. At least one high-profile dispensary canceled the ribbon-cutting for its planned San Jose branch out of concern over more busts.

"The key to resolving this is having the district attorney's office direct the special enforcement team to stand down," Stewart said. Until then, he said, "we know the raids are going to continue."